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(C)
Single Bench

IN THE HIGH COURT OF JUDICATURE AT BILASPUR
CHHATTISGARH

Cr.M.P. No. 71 of 2006

Applicants : 1.Sunil Singh @ Raju S/o Shreeniwas Singh
in jail
Aged about 26 years, Caste-Rajput, R/o
Village- Badkagaon,Thana-Chalgali, Teh.-
Wadrafnagar, Distt. Sarguja (C.G.)

4023/06
15/9/06
Sanjay Agrawal
9/9/06

2. Kuldeep Yadaw S/o Roopdev Yadaw
Aged about 25 years, R/o Vill. Chalgali
Thana-Chalgali, Teh.- Wadrafnagar,
Distt. Sarguja (C.G.)

3. Dhasai S/o Gendaram
Aged about 30 years, R/o Vill.Bartikala
Thana-Chalgali, Teh.- Wadrafnagar,
Distt. Sarguja (C.G.)

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15-9-06

VERSUS

Respondent : State of Chhattisgarh , Through- Station
House Officer P.S.-Bhatgaon, Distt.
Sarguja (C.G.)

APPLICATION U/S 482 OF THE CODE OF CRIMINAL PROCEDURE 1973.

(14) A.F.R.
3.10.06

HIGH COURT OF CHHATTISGARH AT BILASPUR

Misc. Petition
Cr. ~~Appeal~~ No. 71/2006

Sunil Singh and two others

Vs.

State of Chhattisgarh

Post for Order: 03 .10.2006

Sd-/
Dilip Raosaheb Deshmukh
Judge

A.F.R.
3.10.06

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Misc.Petition No. 71/2006

Before: Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

Sunil Singh and two others.

Vs.

State of Chhattisgarh

Present:
Ms. Sharmila Singhai, Counsel for the applicants.
Shri G.K.Beriwal, Dy. Advocate General for the State.

O R D E R

(Passed on this 3rd day of October, 2006)

Being aggrieved by the order dated 12.07.2006 passed by Shri V. B. Singh, learned 1st Additional Sessions Judge, Surajpur in Criminal Revision No. 156/2006 affirming the order dated 30.06.2006 passed by the Additional Chief Judicial Magistrate, Surajpur in Criminal Case No. 405/2006whereby the application under Section 167 (2) Cr.P.C. filed by the applicants on 29.06.2006 was dismissed, the applicants herein have filed this petition under Section 482 Cr.P.C.

2. Undisputed facts are that the applicants were arrested on 31.03.2006 in crime No.08/2006 by Police Outpost Bhatgaon, Police Station Pratappur for an offence under Section 395 I.P.C. The applicants were produced before the Additional Chief Judicial Magistrate, Surajpur on the same day who authorized their detention in judicial custody from time to time. On 29.06.2006 before the filing of challan, an application was moved at 11.00 A.M. on behalf of the applicants under Section 167 (2) of the Cr.P.C. Arguments were heard on the said application. At about 4.00 P.M. challan was filed by Police

Outpost Bhatgaon, P.S. Pratappur against the applicants in the aforesaid crime No.08/2006 under Section 395 I.P.C. On 30.06.2006 the learned Additional Chief Judicial Magistrate, Surajpur dismissed the application on the sole ground that the date of arrest of the applicants was to be excluded while computing the period of authorization for detention in judicial custody and for deciding whether the challan was filed within the said period or not. Computing in this manner, the learned Addl. Chief Judicial Magistrate excluded the date of arrest i.e. 31.03.2006 and held that the challan having been filed on the 90th day the right to be released under Section 167(2) Cr.P.C. did not accrue to the applicants. It is also not disputed that in an offence under Section 395 I.P.C., the period for which the Magistrate may authorize detention of the accused-person is 90 days.

3. Ms. Sharmila Singhai, learned counsel for the applicants argued that the challan was filed on the 91st day at 4.00 P.M. The applicants having exercised their right under the proviso to Section 167 (2) Cr.P.C. prior to filing of challan, an indefeasible right had accrued in favour of the applicants for being released on bail. Reliance was placed on *Chaganti Satyanarayana and others v. State of Andhra Pradesh*[1], *Uday Mohanlal Acharya v. State of Maharashtra*[2] and *State of Maharashtra v. Mrs. Bharati Chandmal Varma alias Ayesha Khan*[3]. It was also contended that exclusion of the day of arrest in computing the period of detention as envisaged under the proviso to Section 167 (2) Cr.P.C. by both the courts below was wholly illegal since the period of detention is to be completed from the day of grant of remand. On the other hand, Shri G.K. Beriwal, learned Dy. Advocate General argued in support of the impugned order.

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1. AIR 1986 SC 2130 2. (2001) 5 SCC 453 3. AIR 2002 SC 285

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4. Having considered the rival submissions, I have perused the documents annexed to the petition. Section 167 of the Cr.P.C. lays down the procedure when investigation cannot be completed in 24 hours. A duty is cast upon the Police Officer to produce any person arrested and detained in custody to be produced before the nearest Magistrate if investigation cannot be completed within a period of 24 hours fixed by Section 57 of the Code of Criminal Procedure. Under sub-section (2) of Section 167, the Magistrate to whom an accused person is forwarded may, whether he has or has no jurisdiction to try the case, from time to time authorize the detention of accused in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction. Here a reference to proviso to sub-section (2) becomes necessary which is reproduced as under:

> "Provided that---
>
> [(a) the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding,---
>
> (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years:
>
> (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the

said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter];"

5. In **Uday Mohanlal Acharya vs. State of Maharashtra** (supra), it was observed by the Apex Court as under:

"Section 167 is in fact supplementary to Section 57, in consonance with the principle that the accused is entitled to demand that justice is not delayed. The object of requiring the accused to be produced before a Magistrate is to enable the Magistrate to see that remand is necessary and also to enable the accused to make a representation which he may wish to make. The power under Section 167 is given to detain a person in custody while the police goes on with the investigation and before the Magistrate starts the enquiry. Section 167, therefore, authorizes the Magistrate to permit detention of an accused in custody and prescribes the maximum period for which such detention could be ordered. Under sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence, can authorize detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.

Having prescribed the maximum period what would be the consequences thereafter has been indicated in the proviso to sub-section (2) of Section 167. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and does furnish the bail as directed by the Magistrate. The proviso is unambiguous and clear and stipulates that the *accused shall be released on bail if he is prepared to and does furnish the bail* which has been termed by judicial

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pronouncement to be "compulsive bail" and such bail would be deemed to be a bail under Chapter 33. The proviso to sub-section (2) of Section 167 is a beneficial provision for curing the mischief of indefinitely prolonging the investigation and thereby affecting the liberty of a citizen."

The words "if he is prepared to and does furnish bail" have also been interpreted by the Apex Court in **Uday Mohanlal Acharya** (supra) as under:

> "If, however, the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (*a*) will not be unauthorized, and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.
>
> The indefeasible right of the accused does not survive or remain enforceable on the challan being filed, if already not availed of, as has been held by the Constitution Bench of the Supreme Court in *Sanjay Dutt case*[4]. The expression "if not already availed of" used in *Sanjay Dutt case* must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (*a*) of the proviso to sub-section (2) of Section 167 if the accused files an application for bail, alleging that no challan has been filed and he is prepared to offer the bail that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail and the accused has not furnished

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4. **1994 SCC (Cri) 1433** (*Sanjay Dutt v. State*)

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> the same. With the aforesaid interpretation of the expression "availed of", if the charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished. Necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then the accused moves the higher forum and while the matter remains pending before the higher forum for consideration, a charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby and on the other hand, the accused has to be released on bail."

6. In view of the law laid down by the Apex Court, the only point that arises for consideration is whether for considering if an indefeasible right accrues in favour of the accused for being released on bail under the proviso (a) (ii) to sub-section (2) of Section 167 Cr.P.C. the date of arrest should be excluded in computation of the period for which the Magistrate may authorize detention of the accused-person even where the accused is produced on the same day before the Magistrate and remanded to judicial custody. Under Section 167(2) of Cr.P.C., detention can be authorized by the Magistrate only from the time the order of remand is passed. The earlier period during which the accused is in custody of a Police Officer in exercise of powers under Section 57 of the Code of Criminal Procedure cannot constitute detention pursuant to authorization issued by the Magistrate. It is thus clear that the period during which the Magistrate may authorize the detention of the accused in judicial custody is to be computed from the date of judicial remand granted by the Magistrate. It is only when the accused after being arrested is produced on the next day before the Magistrate that exclusion of the day of arrest while computing the

period of detention in judicial custody would be justified. I am fortified in my view by the decision of the Supreme Court in **Chaganti Satyanarayana and others** (supra) wherein it was held as under:-

> "The words used in proviso (a) to S. 167(2) are "no Magistrate shall authorize the detention of the accused person in custody", "under this paragraph", "for a total period exceeding i.e. 90 days/60 days". Detention can be authorized by the Magistrate only from the time the order of remand is passed. The earlier period when the accused is in the custody of a public officer in exercise of his powers under S. 57 cannot constitute detention pursuant an authorization issued by the Magistrate. It, therefore, stands to reason that the total period of 90 days or 60 days can begin to run only from the date of order of remand."

7. It is thus clear that the date of grant of judicial remand being 31.3.2006 it must be included while computing the period during which the Magistrate may authorize detention before filing of the charge sheet by the Police. Computing in this manner, it is crystal clear that on 29.06.2006 when the applicants moved an application at 11.00 A.M. for release on bail, a period of 90 days had already expired. 29.06.2006 was the 91st day on which the applicants exercised their right under Section 167 (2) Cr.P.C. before filing of charge sheet. On 29.06.2006 since arguments on the said application were also heard by the Additional Chief Judicial Magistrate, he ought to have disposed of the said application forthwith instead of keeping it pending till challan was filed. The challan was filed at 4.00 P.M. on 29.06.2006.

8. In **Uday Mohanlal Acharya** (supra), it was held by the Apex Court that on the expiry of said period of 90 days, an indefeasible right accrues in favour of the applicants for being released on bail on

account of default by the Investigating Agency in the completion of investigation within the prescribed period, if the accused is prepared and does furnish the bail, as directed by the Magistrate. The proviso is unambiguous and clear and stipulates that the accused shall be released on bail. The indefeasible right of the accused does not survive if the accused does not exercise such right before the filing of challan even though the challan may be filed after the prescribed period of 90 days or the 60 days, as the case may be.

9. In the above mentioned circumstances, an indefeasible right had accrued in favour of the applicants for being released on bail under the proviso (a) of sub-section (2) of Section 167 of Cr.P.C. The applicants/accused-persons did exercise their right by moving an application under the proviso (a) to sub-section (2) of 167 Cr.P.C. In this manner, the mere filing of challan subsequently on the same day at 4.00 P.M. could not in any manner frustrate the indefeasible right of being released on bail that had accrued in favour of the applicants. Negation of that right under the orders passed by both the Courts below is thus perverse occasioning failure of justice.

10. In the result, the petition under Section 482 Cr.P.C. succeeds. The impugned order dated 12.07.2006 passed by the 1st Additional Sessions Judge, Surajpur as also the order passed by the Addl. Chief Judicial Magistrate, Surajpur on 30.06.2006 are set aside. The application under the proviso to sub-section (2) of Section 167 Cr.P.C. filed by the applicants on 29.06.2006 is allowed. It is ordered that the applicants shall be released on bail on their furnishing a personal bond of Rs.50,000/- each along with a local solvent surety in the like sum to the satisfaction of learned trial Judge for their regular

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appearance during trial as and when directed. It is directed that the Magistrate shall verify the surety bond and personal bond before acceptance and shall ensure that photograph of the surety is affixed on the surety bond.

Certified copy as per rules.

Sd-/
Dilip Raosaheb Deshmukh
Judge